



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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ISCR Case No. 18-02049

Applicant for Security Clearance

Appearances

For Government: Raashid S. Williams, Esq., Department Counsel

For Applicant: *Pro se*

01/28/2020

Decision

MASON, Paul J., Administrative Judge:

Applicant did not file his 2013 through 2017 federal and state tax returns until July and August 2018, even though he has always known that he was legally obligated to file tax returns. Additionally, he owes more than \$30,000 in delinquent federal taxes. Eligibility for security clearance access is denied.

Statement of the Case

On November 1, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP, GE 1) for security clearance eligibility so that he could work for a defense contractor. In an undated set of interrogatories, Applicant was asked to verify the accuracy of interviews he had with investigators from the Office of Personnel Management (OPM) on November 7 and 9, 2017, and February 6, 2018. He was asked and submitted documentation about the status of date-certain federal and state tax returns. The Department of Defense (DOD) could not make the necessary affirmative finding to grant Applicant's security clearance and issued a Statement of Reasons (SOR)

on May 30, 2018 to him detailing security reasons under the financial considerations guideline (Guideline F). The action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective in the DOD on June 8, 2017.

Applicant provided his notarized answer to the SOR on October 10, 2018, and requested a hearing. The case was assigned to me April 4, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 9, 2019, scheduling the hearing on June 13, 2019. The hearing was held as scheduled. The Government's three exhibits (GE) 1-3 were admitted into evidence without objection. Applicant's objection to GE 2 was overruled and the exhibit was admitted. Applicant's three exhibits (AE A-C) were admitted into evidence without objection. The record remained open until June 21, 2019 to allow Applicant the opportunity to submit post-hearing exhibits. Copies of federal and state tax documents and other information covering tax years 2013 through 2017 were admitted into evidence as Applicant's Exhibit (AE) D-I, without objection. The record closed on July 8, 2019, when the transcript (Tr.) was received.

Rulings on Evidence

At the June 2019 hearing, the Government submitted a set of undated interrogatories (GE 3) into evidence. The interrogatories asked Applicant to verify the accuracy of his personal subject interviews (PSIs) of November 7 and 9, 2017, February 6, 2018, and a PSI that is cited as having taken place in May 2016, with investigators from the Office of Personnel Management (OPM). Clearly, the May 2016 PSI never occurred because Applicant did not sign and certify his e-QIP until November 2016. The interrogatories also requested Applicant to answer questions whether he filed missing federal and state tax returns for certain years and how much he owed both tax entities. The pages within the exhibit are numbered in the lower right hand corner of the exhibit. Applicant acknowledged the accuracy of the PSIs. However, only the November 7, 2017 PSI and an incomplete portion of the November 9, 2017 PSI are included in the exhibit. The February 16, 2018 PSI does not appear with the other two PSIs. On November 26, 2019, the Government supplied the missing information regarding the November 9, 2017 and February 16, 2018 PSIs. The missing information that accurately completes GE 3 is a one-page document attached to the Government's November 26, 2019 email (Hearing Exhibit (HE) 2). The Government has an important responsibility during a security adjudication to provide full discovery to an applicant. Toward that end, the Government must ensure that the exhibits it presents in discovery and seeks to enter into the record at the hearing are complete copies of exhibits so that an applicant is placed on sufficient notice of the evidence the Government intends to rely on in support of the SOR. The Government's efforts to rehabilitate the record do not eliminate the fact that GE 3 was an incomplete exhibit when I entered the exhibit into evidence at the June 2019 hearing. (GE

3 at 2-5) Therefore, upon reconsideration, I have admitted GE 3 into evidence, but I have reduced the probative weight assigned to this exhibit.

Applicant signed the interrogatories (GE 3), but the notary is incomplete as only a day "15" and a year "2018" appear underneath his signature and above the notary. Based on the dates posted in the Internal Revenue Service (IRS) documents and state tax document, Applicant most likely submitted his answers to GE 3 in late June or early July 2018.

At the hearing, Applicant objected to the March 2017 credit bureau report (GE 2) because he had paid all his debts. His objection was overruled. I explained to him that even though the exhibit may show he paid all his debts, that claim does not preclude the admissibility of the exhibit into evidence. I also advised him that the report may be interpreted as favorable evidence inferring that he has a habit of paying most of his debts. GE 2 was admitted. (GE 2; Tr. 26-28)

Findings of Fact

The SOR alleges that Applicant failed to file his federal and state tax returns for tax years 2013 through 2017 (SOR 1.a, 1.c) The SOR also alleges that Applicant owes unpaid taxes to the federal and state tax agencies. (SOR 1.b, 1.d) Applicant admitted all allegations.

Applicant is 57 years old. He has been married for 26 years. He has five children, 41, 40, 37, 27, and 19 years old. The youngest still lives with him. After graduating from high school in 1980, Applicant worked as a messenger, a housekeeper for two or three hotels, and a lead worker custodian for a training company. From 2014 to 2016, he worked for a contractor as a lead maintenance technician at a US Naval installation. From November 2016 to the present, Applicant has been employed through a defense contractor as a cleaner for a federal agency. Applicant's employment record indicates he has been employed without interruption since April 2004. He has held a clearance granted by another federal agency in 2012. He did not indicate the type of clearance. (GE 1 at 8-9, 26; GE 3 at 9-10; Tr. 43-44)

Applicant did not file his 2013-2017 federal and state tax returns (SOR 1.a-1.d) until July 2018. Though his November 2016 e-QIP response indicates "no" to the question of having ever failed to file tax returns or pay taxes in the last seven years, Applicant contends his facility security officer (FSO), who helped him complete the security form, inserted a "no" instead of a "yes" response to the question. In his November 2017 PSI and his 2018 answers to interrogatories, Applicant indicated he had not filed federal and state tax returns for the years identified in the SOR and owed the federal and state taxes identified in the SOR. Applicant also informed the OPM investigator in November 2017

that he was trying to establish a payment plan with the federal tax agency. (GE 1 at 26; GE 3 at 5, 11)

At the June 2019 hearing, Applicant testified that he had documentation at home to verify he filed the missing federal and state tax returns (SOR 1.a, 1.c). Applicant's hearing documentation shows that he filed a federal tax return for 2018 (AE A, unlisted, undated, and unsigned). His post-hearing submissions reflect that the missing federal tax returns for 2017, 2016, 2015 (AE E), 2014 (AE F), and 2013 (AE G), were filed in July 2018. He explained that he did not file his federal and state tax returns on time because he did not have the money to pay the corresponding taxes due and he thought he could get away with not filing and paying taxes. His motivation for filing the federal returns was to obtain a security clearance. (Tr. 44-47)

In November 2018, Applicant initiated payments under a plan he established with the Internal Revenue Service (IRS) in October 2018. He claimed that he made nine payments under the plan to pay off \$36,290. (SOR 1.b) At the hearing, he noted that proof of the payments was recorded on his cell phone. In his post-hearing documentation, he provided proof that he made three payments to the IRS in September 2018, February 2019, and June 2019. As the confirmation receipts show, these payments apply to tax year 2008 (unlisted). The receipts do not show what Applicant's payment amounts are under the IRS payment plan. The other four payments are to the state tax agency (SOR 1.d). (Tr. 39; AE H at 1-3)

In August 2018, Applicant filed his delinquent state tax returns for tax years 2013 through 2017 (SOR 1.c). (Tr. 39, 49; AE I)

When the SOR was issued in September 2018, Applicant owed \$6,878 to the state tax agency. In May 2019, the amount was reduced to \$1,888, with Applicant's next installment payment due on June 15, 2019. He acknowledged that the large reduction in delinquent state taxes within an eight-month period was due to a \$2,200 mistake made by the state tax agency in computing the actual amount of back taxes. After subtracting \$2,200 from the total back tax figure of \$6,878, the amount was reduced to \$4,678. Subtracting Applicant's 2019 state tax refund of \$2,000 from \$4,678 leaves a remainder of \$2,678. Applicant's documentation reveals that he made four payments totaling \$367 to the state tax agency. Subtracting \$367 from \$2,678 leaves a remainder of \$2,311, not \$1,888, the amount posted in the May 2019 state tax agency documentation. There must be other payments that Applicant made but did not submit for entry into the record. (GE 3 at 23; Tr. 50-51; AE B; AE H at 4, 5, 7, 9)

Applicant earns \$59,400 a year or a little over \$4,000 a month. His wife has been unemployed for almost three years. The record does not reveal the reason for her unemployment. According to amounts provided by Applicant, his monthly expenses include a mortgage of \$1,198; a grocery bill of \$300; a utility bill of \$350; a water bill of

about \$68; a cable and telephone bill of \$200; medicine of \$35; and a home improvement bill of \$300. His monthly expenses total \$2,451, leaving a monthly remainder (discretionary income) of approximately \$1,549 (\$4,000-\$2,451). Applicant testified he may have enough money remaining for a family outing every two weeks. He did not explain how and where he spent the balance of the monthly remainder. Applicant has \$25 in his checking account and no savings or retirement accounts. Though he indicated that he never had financial counseling, he informed the OPM investigator in November 2017 that he used a credit-counseling service to pay delinquent debts to a financial company and a landlord. (GE 3 at 12; Tr. 54-58)

When I asked Applicant at the June 2019 hearing what his practice was in filing his tax returns before 2013, the first posted year in the SOR when he did not file his federal and state tax returns, he responded that it was “good.” When next questioned about what “good” meant, he replied that his filing practices were “fair.” He then admitted he skipped filing a couple of years before the first listed tax year of 2013 and that was why his current delinquent federal taxes were so high. His three IRS payment confirmation receipts reflect the payments were applied to 2008, probably confirming Applicant’s earlier testimony that 2013 was not the first year he did not file his federal tax returns. (He was 46 years old in 2008.) Applicant contended that he had not always known that he could negotiate a payment plan (with the IRS) to pay his back taxes. He has always been aware of his legal obligation to file his federal and state tax returns. (Tr. 60-62; AE H at 1-3)

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines and all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. These guidelines, which are flexible rules of law, are applied together with common sense and the general factors of the whole-person concept. The protection of the national security is the paramount consideration. AG ¶ 2(d) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . .” The applicant has the ultimate burden of persuasion in seeking a favorable security decision.

Analysis

Financial Considerations

AG ¶ 18. Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

Paying voluntarily incurred debts in a timely fashion demonstrates good judgment and reliability. Filing federal and state tax returns, and paying corresponding taxes every year in a timely manner also demonstrates good judgment, and accomplishes an applicant's legal obligation to comply with well-established rules and regulations, a key factor for those who seek security clearance eligibility.

AG ¶ 19. The disqualifying conditions relevant in this case are:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

The SOR reflects that Applicant did not file federal and state tax returns for 2013 through 2017. The account transcripts and other documentary information within GE 3 support the SOR allegations. Title 26 U.S.C. § 7203 indicates a failure to file a federal tax return is a federal criminal offense at the misdemeanor level, irrespective of the tax liability. The Government has established a case under AG ¶¶ 19(a) and 19(c) because Applicant has incurred a history not meeting financial obligations. His conduct is significant under AG ¶ 19(f) because Applicant not filed his federal and state tax returns

and has failed to pay taxes as required by law. He has the burden of rebutting or mitigating Government's case.

AG ¶ 20. Conditions that could mitigate security concerns include:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

AG ¶ 20(a) does not apply. Though Applicant has filed the missing federal and state tax returns, he still owes more than \$30,000 in federal taxes. He still owes at least \$1,888 under the state tax agency payment plan. His filing of his 2018 federal tax return in a timely fashion does not overshadow his practice of not filing his federal and state tax returns for the previous five years, and continues to raise questions about his reliability and judgment.

Applicant's November 2016 e-QIP indicates that his employment since 2004 has not been disrupted by any adverse negative action like demotion or unemployment. There is no evidence of unforeseen medical issues thwarting Applicant's ability to file his tax returns. His wife's unemployment for almost three years carries some probative weight, but Applicant provided no supporting evidence of why his wife was unemployed and how it kept Applicant from filing his tax returns. He receives limited mitigation under the first prong of AG ¶ 20(b). He receives negligible mitigation under the second prong of the condition of acting responsibly under the circumstances due to the five-year delay in filing his federal and state tax returns.

While Applicant indicated that he has never had financial counseling, he informed the OPM investigator that he utilized some type of credit counseling service to resolve two of his unlisted delinquent debts. In November 2018, he finally enrolled in a payment plan with the IRS, but only submitted three payments under the plan. The dramatic reduction in delinquent state tax in a short period was due to the state's computation error and impoundment of Applicant's 2019 tax refund, rather than regular payments made by Applicant under the state's payment plan. Applicant has not presented a sufficient track record of payments under either installment plan for me to conclude his tax issues are under control. AG ¶ 20(c) does not apply.

Applicant filed all the listed federal and state returns in July or August 2018, up to five years late rather than in a timely fashion. When he completed his November 2016 e-QIP, he knew he had not timely filed federal and state tax returns in a timely manner. His knowledge is supported by his subsequent disclosure to the OPM investigator in November 2017 that he had directed his FSO to answer "yes" instead of "no" to the tax return question on his November 2016 e-QIP. Even though Applicant claimed he was planning to enroll in a payment plan with the IRS in November 2017, he did not actually enroll until November 2018. On balance, the limited mitigation Applicant receives under AG ¶ 20(d) does not surmount the adverse evidence under AG ¶ 19(a).

AG ¶ 20(g) applies to the circumstances of this case because Applicant filed the missing federal and state tax returns. However, the amount of mitigation is limited due to the long period of inaction and the small number of payments made under both plans. The timing of an applicant's action to resolve his financial problems is an important element of his case in mitigation. If he acts only after being placed on notice that his tax issues represent a government concern, he may not have the good judgment to comply with security rules and regulations at all times and in all places, or when there is no looming threat to his personal interests. Applicant's failure to file his federal and state tax returns until July and August 2018, after being aware at least since November 2016 that the missing returns were a government concern, reduces the weight that his corrective action would otherwise warrant.

Whole-Person Concept

I have examined the evidence under the guideline for financial considerations in the context of the nine general factors of the whole-person concept listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of

rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole-person concept.

Applicant's insufficient-funds-reason for not filing his tax returns does not excuse his legal obligation for file his tax returns. Not filing his tax returns because of his desire to escape responsibility of having to pay taxes represents seriously poor judgment that aggravates Applicant's conduct. The record shows that Applicant still owes delinquent federal taxes for 2008, five years before he stopped filing federal tax returns for a five-year period beginning in 2013. Applicant has not mitigated the guideline for financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the security interests of the United States to grant Applicant eligibility for access to classified information. Eligibility for access to classified information is denied.

Paul J. Mason
Administrative Judge